IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.620 OF 2005
AND
WRIT PETITION NO.622 OF 2005

M/s.German Remedies Ltd.,
Since amalgamated with
Cadila Healthcare Ltd.
having their office at
Shivsagar Estate, Block 'A'
Dr. Annie Beasant Road,
Worli, Mumbai - 400 018 .. Petitioner.

V/s.

1. Dy. Commissioner of
Income-tax, Circle 6(3),
Mumbai, Aayakar Bhavan,
M.K. Road, Mumbai 20

2. Commissioner of Income-
Tax, Mumbai, Aayakar
Bhavan, M.K. Road,
Mumbai - 400 020.

3. Union of India,
through Ministry of
Finance, North Block,
Central Secretariat,
New Delhi .. Respondents.

Mr.A.R. Singh with Mr.K. Shivram i/b. K. Gopal & Mr.P.K. Parida for the petitioner.

Mr.A.S. Rao for the respondents.

CORAM : V.C. DAGA &
J.P. DEVADHAR, JJ.

DATED : 10TH OCTOBER, 2005.

ORAL JUDGMENT (PER J.P. DEVADHAR, J.) :

1. In these two writ petitions, the notices issued under Section 148 of the Income Tax Act, 1961

('Act' for short) both dated February 18, 2005 relating to the assessment years 1999-2000 and 2000-2001 are challenged. Even the objections raised by the assessee have been rejected by the assessing officer. Since the reasons for re-opening the assessment are identical, both the petitions are heard and disposed of by a common judgment.

2. For the sake of convenience, we set out the reasons recorded for re-opening the assessment for A.Y. 1999-2000 which read as follows :

"M/s.GERMAN REMEDIES LTD.
A.Y. 1999-2000

It is seen from the assessment records that:

1) Expenses on interest, royalty, consultancy and analytical fees paid in foreign currency were allowed though the assessee has not furnished any evidence to show that TDS has been deducted at source before remitting it.

2) Deduction of gross dividend has been allowed against the allowable net dividend.

3) Central Excise duty and Customs duty payable on finished goods were not taken into account while valuing closing stock.

4) Processing charges received by the assessee for the job work done for others out of the profit for allowing deduction u/s.80-IA / 80-IB has not been excluded while finalising the assessment.

I have, therefore, reason to believe that income assessable to tax has escaped assessments issue notice u/s.148 of the I.T. Act, 1961.

(SAMIR TEKRIWAL)

DCIT, Cir.6(3), Mumbai."

In the assessment year 2000-2001, the very same reasons are recorded except item No.2 set out hereinabove.

3. For the assessment year 1999-2000, the return of income was filed on December 29, 1999. On January 31, 2002, the assessment order under Section 143(3) of the Act was passed determining income at Rs.23,68,07,847/- after making various additions and disallowances.

4. By the impugned notice dated February 18, 2005 issued under Section 148 of the Act, the Assessing Officer sought to re-open the assessment for A.Y. 1999-2000 for the reasons stated hereinabove. The petitioner filed a writ petition to challenge the said notice. This Court on January 18, 2005 directed the petitioner to file objections for re-opening the assessment and further directed the assessing officer to dispose of the same in accordance with law. Accordingly, the petitioner filed its objections. However, the objections raised by the petitioner for re-opening the assessment have been rejected by the assessing officer vide order dated February 18, 2005. Therefore, the petitioner has once again moved this Court to challenge the said

order.

5. It is a settled position of law that though the power conferred under Section 147 of the Income-tax Act for re-opening the concluded assessment are very wide, the said power cannot be exercised mechanically or arbitrarily. The expression ‘reason to believe that any income chargeable to tax has escaped assessment’ means entertaining a reasonable belief that a particular income went unnoticed by the assessing officer and hence escaped assessment. Even after the introduction of the concept of the deemed escapement of income by Explanation 2 to Section 147 of the Act with effect from April 1, 1989, the belief that the income has escaped assessment entertained by the assessing officer must be a prudent belief and not mere change of opinion. Thus, an assessment order passed after detailed discussion cannot be re-opened within a period of 4 years from the end of the relevant assessment year, unless the assessing officer has reason to believe that due to some inherent defect in the assessment, the income chargeable to tax has been underassessed or assessed at too low a rate or excessive relief is granted or excessive loss or depreciation allowance or any other allowance under the Act has been computed.

6. In the present case, after the service of the notice under Section 148 of the Act, the assessee had filed its objections for re-opening the assessment to the effect that in the light of the binding decision of this Court and the decision of the Income Tax Appellate Tribunal there is no scope for entertaining the belief that the income has escaped assessment. However, the said objection has been rejected without even considering the said binding decision. Therefore, it is necessary to find out as to whether the condition precedent for invoking the jurisdiction to re-open the assessment have been met with or not.

7. The first ground for re-opening the assessment is that the assessee had not furnished any evidence to show that the tax was deducted at source before making remittances in foreign currency relating to payment of interest, royalty, consultancy and analytical fees. However, it is brought to our notice that by a letter dated June 22, 1999 the assessee had furnished its annual return of deduction of tax at source during the financial year 1998-1999 relevant to assessment year 1999-2000. Receipt of the said letter is not disputed by the counsel for the revenue. Thus, the re-opening of the assessment

on the ground that the assessee has not furnished TDS particulars is wholly unjustified.

8. The second ground for re-opening the assessment is that the gross dividend has been allowed against the allowable net dividend. In the present case, dividend income received during the year was claimed as exempt and the same was accepted in the assessment order passed under Section 143(3) of the Act. The reason for re-opening the assessment is that in the absence of particulars it cannot be said that no part of the borrowed fund has been used for investment from which the income generated is exempt under Section 10(33) of the Act and that the assessee must have incurred expenditure for earning the dividend income such as proportionate salary, telephone changes etc. which ought to have been disallowed from the gross dividend income received by the assessee. From the reasons recorded by the assessing officer, it is clear that the assessment is sought to be re-opened merely on suspicion that the assessee might have utilised the borrowed fund for investment and that the assessee must have incurred expenditure for earning the dividend income. There is no material whatsoever to entertain a prima-facie belief that the income has escaped assessment and the reasons entertained by the assessing officer that the

income has escaped assessment is wholly based on presumption, conjectures and surmises. Re-opening of the assessment based on suspicion, presumption, conjectures and surmises is not permissible in law.

9. As regards the third ground for re-opening the assessment, counsel for the revenue has fairly stated that in view of the decision of the Apex Court in the case of Commissioner of Income-Tax V/s. Indo-Nippon Chemical Co. Ltd. [261 ITR 275], the re-opening the assessment on that ground does not survive.

10. The fourth and the last ground for re-opening the assessment is that the processing charges received by the assessee for the job work done for locals were not income derived from industrial activity and, therefore, the processing charges ought to have been excluded while computing deduction under Section 80-IA/80-IB of the Act. It is brought to our notice that the very same issue was agitated for A.Y. 1996-97 and the Tribunal by its order dated September 1, 2004 has held that the processing charges received by the assessee are liable to be included for the purposes of deduction under Section 80-IA / 80-IB. The above decision of the Tribunal was brought to the notice of the

assessing officer vide letter dated January 31, 2005. However, the assessing officer vide his order dated February 18, 2005 rejected the objection without referring to the said decision. This conduct of the assessing officer in refusing to follow the binding decision of Income Tax Appellate Tribunal is highly deplorable. Therefore, re-opening of the assessment on account of processing charges is also unsustainable.

11. In this view of the matter, since the re-opening of the assessment is based on conjectures & surmises and the same is sought to be justified by ignoring the binding decisions in our opinion, the re-opening of the assessment is in gross abuse of the process of law and the same is liable to be quashed and set aside.

12. In the result, the petition is allowed. The notices issued under Section 148(1) of the Act in both the petitions are quashed and set aside. Rule is made absolute in terms of prayer (a) in both the petitions with no order as to costs.

(V.C. DAGA, J.)

(J.P. DEVADHAR, J.)